STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RANDY HOLLOWAY,

Defendant-Appellant.

UNPUBLISHED
February 5, 2004

No. 243325
Macomb Circuit Court
LC No. 01-002194-FH

Before: Cooper, P.J., and O'Connell and Fort Hood, JJ.

PER CURIAM.

Defendant was charged with delivery of an imitation controlled substance, MCL 333.7402(2)(a), delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv), and driving on a suspended license, MCL 257.904(3)(a). Following a jury trial, he was acquitted of the first charge and convicted of the other two charges. He was later sentenced to a prison term of twenty-three months to twenty years on the controlled substance conviction and ninety-three days on the suspended license conviction. Defendant appeals his controlled substance conviction as of right and we affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first contends that the trial court erred in allowing the prosecutor to elicit evidence that he was known for selling heroin. This issue has not been preserved because defendant failed to object at trial. MRE 103(a)(1); *People v Aldrich,* 246 Mich App 101, 113; 631 NW2d 67 (2001). Therefore, review is precluded unless defendant demonstrates plain error that affected the outcome of the lower court proceedings. *People v Carines,* 460 Mich 750, 763; 597 NW2d 130 (1999).

The prosecutor never asked whether defendant was known for selling other controlled substances in addition to cocaine. He asked only if the substance purchased was tested for the presence of a substance other than cocaine and, if so, what substance. Such a question was not improper because it was relevant to the charge of delivery of an imitation controlled substance. When the witness answered the question, he stated that he also tested the substance for heroin and volunteered the objectionable testimony to explain the reason he did so.

"An unresponsive answer to a proper question is not usually error." *People v Measles,* 59 Mich App 641, 643; 230 NW2d 10 (1975). The volunteered testimony does not provide a basis for relief absent some evidence that the prosecutor knew the question would elicit the answer or

"conspired with or encouraged the witness to give that testimony." *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990). There is no such allegation or evidence in this case. Moreover, despite the prejudicial nature of the testimony, the evidence against defendant was so strong that it is unlikely that the jury would have acquitted defendant of delivery of cocaine had the evidence been excluded. Both witnesses testified that Officer Neiborg met on three occasions with a man known as Arab (i.e., defendant), that Neiborg bought cocaine from him, and that they were positive that defendant was the man in question. They also identified a photograph of defendant and stated that it portrayed the man they knew as Arab. Defendant did not deny that Arab sold drugs to Neiborg, but simply disputed that he was the man known as Arab. Given the strength of the evidence against defendant, his substantial rights were not affected and reversal is not required. *Carines*, *supra*.

Defendant alternatively argues that trial counsel was ineffective for failing to object to the testimony in question. Defendant failed to raise this claim below in a motion for a new trial or an evidentiary hearing, so we limit our review to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). "To prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance was objectively unreasonable and the representation was so prejudicial that he was deprived of a fair trial." *People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001). Defendant must also overcome a strong presumption that counsel's assistance constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Although the evidence was prejudicial and it would have been appropriate for defense counsel to object and request a cautionary instruction, the record suggests that defense counsel did not object as a matter of trial strategy. Counsel freely admitted that Neiborg met with Arab and bought drugs from him, including the cocaine giving rise to defendant's conviction. He argued that due to the absence of any concrete evidence connecting defendant to those meetings, he was not the man the officers knew as Arab and the officers were mistaken in their identification. Because defense counsel did not dispute that Arab was a drug dealer, he had no need to object to the testimony that Arab sold heroin as well as cocaine. We will not use hindsight to second-guess counsel's judgment in matters of trial strategy, *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999), and trial counsel's employment of an unsuccessful strategy is not in itself ineffective assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Therefore, defendant is not entitled to a new trial.

Affirmed.

/s/ Jessica R. Cooper
/s/ Peter D. O'Connell
/s/ Karen M. Fort Hood